

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

BETHANY COLLEGE,)	
)	
Respondent,)	Case 14-CA-201546 and
)	14-CA-210584
and)	
)	
THOMAS JORSCH,)	
)	
Charging Party,)	
)	
and)	
)	
LISA GUINN)	
)	
Charging Party.)	

MOTION FOR RECONSIDERATION

The Charging Parties move for reconsideration of the National Labor Relations Board's decision dismissing the complaint in this case. See 29 C.F.R. § 102.48(c). The sole ground for dismissing the complaint was the Board's determination that it lacked jurisdiction over the Charging Parties under *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). In reaching this conclusion, the Board rejected its prior interpretation of *Catholic Bishop* in *Pacific Lutheran University*, 361 NLRB 1404 (2014), in favor of a new interpretation based on *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002).

The decision to overrule *Pacific Lutheran University* was based solely on the Board's understanding of "the clear mandate in the First Amendment of the Constitution that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'" D & O at p. 4. In this regard, the Board asserted that "the

two-part *Pacific Lutheran* test is fatally flawed because its required analysis, at step two, of whether faculty members at religiously affiliated institutions of higher learning are held out as performing a specific religious function entails an impermissible inquiry into what does and what does not constitute a *religious function*.” *Id.* at 5 (emphasis in original). In the Board’s view, “any inquiry that seeks to differentiate between ‘secular’ and ‘religious’ duties or activities of faculty members at [religiously affiliated] schools cannot be undertaken due to the inherent risk of conflict with the rights enshrined in the First Amendment’s Religion Clauses.” *Id.* at 6.

In place of the *Pacific Lutheran* test, the Board held that it “does not have jurisdiction over matters concerning teachers or faculty at *bona fide* religious educational institutions.” D & O at p. 5. The Board found that Bethany College was such a “*bona fide* religious educational institution” based on the College’s public declarations that its purpose as “a Christian institution of higher education” was “to serve Jesus Christ and His church by training men and women who seek a liberal arts education under Christian auspices.” *Id.* at 6.

The Board committed material error, in refusing to assert jurisdiction based on its reading of the First Amendment, in two ways. We take up each of these errors in turn.

First, the Board’s opinion in this case confirms that it “has no expertise in matters of constitutional interpretation.” D & O at p. 5. The understanding of the Religion Clauses articulated by the Board to justify overruling *Pacific Lutheran* has since been directly refuted by the Supreme Court’s recent decision in *Our Lady of Guadalupe v. Morrissey-Berru*, 591 U.S. ____ (July 8, 2020). A court or federal agency can and

should, per that decision, undertake an inquiry that seeks to differentiate between secular and religious duties.

Second, the “*bona fide* religious educational institution” test adopted by the Board violates the free exercise rights of religiously affiliated colleges that would assert a *Catholic Bishop* exception for the portion of their faculty assigned to perform religious functions while not making a confession of faith of the sort demanded by the Board’s test. A college may not wish to describe itself as providing a religious educational environment. But, under the Board’s all-or-nothing approach, it could not then claim that certain faculty that clearly perform religious duties are exempt, and is therefore penalized for exercising its First Amendment right not to make a broad religious proclamation. This error is compounded by the Board’s failure to consider the 1940 Statement of Principles on Academic Freedom and Tenure, which Bethany College follows, and which the Supreme Court has used in past cases to distinguish those parts of a college’s faculty that are under religious control and discipline from those parts that are not.

I. THE NLRB’S INTERPRETATION OF THE FIRST AMENDMENT RELIGION CLAUSES IN THIS CASE IS DIRECTLY CONTRARY TO THE SUPREME COURT’S INTERPRETATION.

In *Our Lady of Guadalupe*, the Supreme Court addressed “whether the First Amendment permits courts to intervene in employment disputes involving teachers at religious schools who are entrusted with the responsibility of instructing their students in the faith.” Slip op. at p. 1. The answer given by the Court is that “[w]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the

teacher threatens the school's independence in a way that the First Amendment does not allow." *Id.* at 26-27.

In so holding, the Court observed that "[t]his does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to . . . the selection of the individuals who play certain key roles." Slip op. at p. 11. To identify such individuals, "[w]hat matters, at bottom, is what an employee does." *Id.* at 18. Thus, in concluding that the employment law claims of two teachers came within this First Amendment exemption, the Court stressed that "they both performed vital religious duties" in that they "provided instruction about the Catholic faith, . . . prayed with their students, attended Mass with students, and prepared the children for their participation in other religious activities." *Id.* at 21-22.

It cannot be that the Religion Clauses bar the NLRB from "differentiat[ing] between 'secular' and 'religious' duties or activities of faculty members" in applying the *Catholic Bishop* exemption from the NLRA, D&O at p. 6, while also requiring courts to determine whether teachers "performed vital religious duties" in applying the ministerial exemption from other federal employment laws, *Our Lady of Guadalupe*, slip op. 21. As the Board observed, it "is entitled to no judicial deference . . . on such matters." D&O at p. 5. Since the Supreme Court's interpretation of the First Amendment prevails, the premise for the Board's rejection of the *Pacific Lutheran* test fails.

Notably, in *Our Lady of Guadalupe*, the Supreme Court saw no problem in undertaking to identify an employee's religious functions. The Court noted that the teachers there taught their students "the belief that Jesus is the son of God and the Word made flesh," prepared students for participation in Mass, took students to

confession, and prayed with students in class. *Our Lady of Guadalupe*, slip op. 5 & 8-9; see also *id.* at 21 (“There is abundant record evidence that they both performed vital religious duties.”). It is no more an intrusion on the First Amendment and an entanglement in religious affairs for the Board to identify such functions, in deciding whether a religious institution holds out a faculty member as performing a specific religious role. To be sure, courts and federal agencies should avoid “resolving underlying controversies over religious doctrine.” *Id.* at n. 10 (quoting *Presbyterian Church in U.S. v. Marcy Elizabeth Blue Hill Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969)). But, this does not prevent them from considering whether the employer itself “regards [a] position as having an important responsibility in elucidating or teaching the tenants of the faith.” *Id.* at 17. If the employer itself does not take this view, then the law applies.

II. THE “*BONA FIDE* RELIGIOUS EDUCATIONAL INSTITUTION” TEST
ARTICULATED BY THE BOARD IN THIS CASE VIOLATES THE FIRST
AMENDMENT RIGHTS OF COLLEGES THAT WISH TO CLAIM AN
EXEMPTION FOR FACULTY WHO DO PERFORM RELIGIOUS FUNCTIONS
WHILE NOT MAKING A GENERAL CONFESSION OF FAITH TO THE PUBLIC.

Under the Board’s new test, the “mechanism for determining when self-identified religious schools [are or] are not, in fact *bona fide* religious institutions” turns on whether they “hold[] [themselves] out to students, faculty, and the community as providing a religious educational environment.” D&O at pp. 5 & 6. Bethany College satisfied this test by proclaiming that it is “a Christian institution of higher education” established “to serve Jesus Christ and His church by training men and women who seek a liberal arts education under Christian auspices.” *Id.* at 6. Having thus established itself as a *bona fide* religious institution, Bethany College is exempt from NLRB jurisdiction with respect

to all of its teachers, including those who have no religious duties at all. This all-or-nothing approach to applying *Catholic Bishop* to religiously affiliated colleges violates the First Amendment by conditioning the availability of that exemption on the college publicly describing its general educational environment in a prescribed way. See *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958) (to deny an exemption under a law to claimants “who engage in certain forms of speech is in effect to penalize them for such speech.”)

In order to claim a *Catholic Bishop* exemption for any portion of its faculty, a college would have to establish that it is “a *bona fide* religious institution” by showing it publicly proclaims its religious mission in a similar fashion to Bethany College.¹ If a college meets that threshold, all of its faculty members are exempt, including those who are under no religious constraints. Since the test does not “call[] on the Board ‘to judge the religiosity of the functions that the faculty perform,’” D&O 4, it necessarily works the other way as well. In other words, none of the faculty – including those who perform important religious functions – can be exempt at a college that chooses not to describe its general educational environment as imbued with religious sentiment.

When it comes to imposing “religious control and discipline” on teachers, *Catholic Bishop*, 440 U.S. at 501, “religiously affiliated” colleges run the gamut from those that have “freely adopted the academic freedom norms of the secular universities” to those that have “maintained the older dogmatic approach within the entire institution, requiring faculty and sometimes students to abide by religious codes of conduct and faith.”

¹ By contrast, the first prong of the *Pacific Lutheran University* test requires only “a minimal showing” of religious affiliation. 361 NLRB at 1410.

McConnell, “Academic Freedom in Religious Colleges and Universities,” 53 Law & Contemp. Probs. 303, 308 (1990). In between these extremes, “[a] larger number [have] adopted various compromises with the secular position, embracing academic freedom in its essentials but taking certain steps to preserve the religious identity of the school” by “confin[ing] religious constraints to those disciplines, such as theology, where religious norms [a]re most directly relevant.” *Ibid.*

The Board’s *Pacific Lutheran University* test takes account of the First Amendment right of religiously affiliated schools to present themselves to the public as generally providing the same sort of education as secular universities while preserving religious control over religious disciplines. The Board’s “*bona fide* religious institution” test does not.

Emory University is an example of a religiously affiliated college toward the secular end of the spectrum. Emory “maintains a formal affiliation with the United Methodist Church.” *Religious Life at Emory*.² But the University most certainly does *not* claim to generally provide an education guided by Methodist religious principles. Quite the contrary, Emory makes a point of broadcasting its independence from the Church. See, e.g., “*God Is Dead*” Controversy³; *Emory and United Methodist Church grapple with legal and traditional ties*⁴. One part of Emory University, however, is clearly religious in nature – the Candler School of Theology, which is one of 13 Methodist

² <http://www.emory.edu/home/life/religious-life.html>.

³ <http://college.emory.edu/program/marianne/portfolio/history/enigmas/GodIsDead.htm>.

⁴ http://www.emory.edu/EMORY_REPORT/erarchive/1997/June/erjune.23/6_23_97MethodistTies.html.

seminaries in the United States.⁵ The Chandler faculty clearly plays “a vital part in carrying out the mission of the church.” *Our Lady of Guadalupe*, slip op. 22. But Emory would not be able to claim a *Catholic Bishop* exemption for the Chandler faculty under the Board’s new test, because it declines to engage in the sort of public religious proclamations that would be required to establish that it is “a *bona fide* religious institution” in the Board’s view.

The 1940 Statement of Principles on Academic Freedom and Tenure endorsed by the American Association of University Professors and the Association of American Colleges provides a widely-accepted method for religious colleges to distinguish those parts of their faculty that are “under religious control and discipline,” *Catholic Bishop*, 440 U.S. at 501, quoting *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971), from those parts that are not. See *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971) (relying on the 1940 Statement); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 756 (1976) (same). The Statement does so by making an exception from the categorical requirement that “[t]eachers are entitled to freedom in the classroom” for those “[l]imitations of academic freedom because of religious or other aims of the institution [that are] clearly stated in writing at the time of the appointment.” American Association of University Professors, *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, Academic Freedom ¶ 2 (1970).⁶ The “limitations clause” was meant to allow “[i]nstitutions that limited freedom for religious or other purposes [to] be exempted from the general rules so long as they stated in writing

⁵ <http://candler.emory.edu/about/index.html>.

⁶ Available at <http://www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm>.

their restrictions as conditions for appointments.” Marsden, “The Ambiguities of Academic Freedom,” 62 Church History 221, 230 (1993).

What religious colleges sought by the inclusion of the “limitations clause” in the 1940 Statement was the option to “require faculty members to adhere to creeds” provided “that such requirements be made known to candidates for positions before they sign on.” Metzger, “The 1940 Statement of Principles on Academic Freedom and Tenure,” 53 Law & Contemp. Probs. at 24 (1990).⁷ A religious college may “impose such demands” without “violating the rules of academic freedom” in the 1940 Statement only if “it makes its doctrinal demands crystal clear in the original terms of employment.” *Id.* at 33.

“In practice, the limitations clause was taken to mean that religious colleges and universities were free to adopt their own principles of academic freedom without interference or censure by the academic community, so long as those principles were clearly announced in advance.” McConnell, 53 Law & Contemp. Probs. at 307-08. This allowed “secular and religious universities [to] coexist, each operating within its own understanding of the principles needed for the advancement of knowledge.” *Id.* at 308.

To show that it held the Charging Parties out as performing a religious function in teaching, Bethany College relied on various statements in the Faculty Handbook about the *College’s* view of *its* mission. (Resp’s Exception Brf. at pp. 12-13.) However, when

⁷ The “limitations clause” was included in the 1940 Statement at the insistence of the Association of American Colleges (AAC), a co-sponsor of the Statement that included many religious colleges among its membership. Metzger, 53 Law & Contemp. Probs. at 22-24 & 32-36. The AAC “held that religious colleges could require faculty members to adhere to creeds but . . . insist[ed] that such requirements be made known to candidates for positions before they sign on.” *Id.* at 24.

the Faculty Handbook comes to describing how the faculty is to perform its teaching function, the Handbook quotes from the 1940 Statement of Principles to the effect that “[t]eachers are entitled to freedom in the class room in discussing their subject” and “[l]imitations of academic freedom because of religious . . . aims of the institution should be clearly stated in writing at the time of appointment.” (GC Exh. 12, p. 55.) The uncontested findings of the ALJ were that no such limitations had been placed on the Charging Parties in carrying out their teaching duties:

“Here, no specific duties relating to religion were stated in the faculty appointment letters that are in evidence for both faculty eligible for tenure and part-time faculties (not eligible for tenure). Jorsch and Guinn provided undisputed testimony that they were never told they were expected to perform a religious role or maintain the university’s religious environment. Likewise, there is no evidence that any faculty was tasked with meeting this requirement.”

D & O at 11.

In their Answering Brief, the Charging Parties raised the issue of Bethany College following the 1940 Statement of Principles in its faculty handbook. (Answering Brf. at pp. 3 & 8.) Nonetheless, the Board’s decision failed to mention this fact at all. Nor did the Board attempt, in its decision, to distinguish the Supreme Court cases -- *Tilton* and *Roemer* -- relying on the 1940 Statement as indicating a separation between secular and religious educational functions. Instead, the Board committed material error in adopting an all-or-nothing approach, the result of which is to penalize a college for exercising its right not to make a broad proclamation that it provides a religious educational environment.

In sum, Bethany College has publicly represented that the Charging Parties' classes would be "taught according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards" in "an atmosphere of academic freedom rather than religious indoctrination." *Tilton*, 403 U.S. at 681. Taking the College at its word, there is no basis under *Catholic Bishop* for exempting the Charging Parties from the protections of the Act. Therefore, the Board should adopt the recommended decision of the ALJ.

Respectfully submitted,

/s/ Christopher N. Grant

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed with the National Labor Relations Board on this 5th day of August 2020 using the NLRB's e-File system and served upon:

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The undersigned hereby certifies that a copy of the foregoing served on the following on this 5th day of August 2020 using the NLRB's E-File system and a copy served upon the following via e-mail:

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